NO. 18-1162

In the Supreme Court of the United States

P. SWANEY, ET AL.,
Petitioners,
v.
HECTOR LOPEZ,
Respondent.

UNKNOWN SWANEY, ET AL.,
Petitioners,
v.
ENRIQUE MONTIJO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Ninth Circuit denied two correctional officers qualified immunity after they refused to second-guess prison nurses' medical judgments. The court did so without citing any precedent clearly establishing that the officers' conduct amounts to deliberate indifference, and in the face of case law from other courts of appeals showing that it does not. The results below do not reflect genuine factual disputes. Instead, they reflect a view of the law that places the Ninth Circuit at odds with its sister circuits on the constitutionality of Petitioners' specific conduct—a question over which the panel itself divided. The decisions below also reflect the Ninth Circuit's ongoing practice of denying qualified immunity based on abstract rights, despite this Court's repeated and unequivocal instructions to the contrary.

The petition for certiorari should be granted, and the decisions below summarily reversed.

I. THE NINTH CIRCUIT HAD JURISDICTION OVER PETITIONERS' APPEALS

Respondents now argue for the first time that the Ninth Circuit lacked jurisdiction over Petitioners' appeals because the district court found "material factual disputes whether Bennett and Swaney acted with deliberate indifference to [each] Plaintiff's serious medical need." Opp. 17 (quoting App. 32, 81). They are incorrect.

A district court cannot insulate its decision from review "simply" by "stat[ing] that there are material issues of fact in dispute." *Collins v. Jordan*, 110 F.3d

1363, 1370 (9th Cir. 1996). Whether a factual dispute is material is a legal question. *Id.* So, too, are the questions whether the governing law was clearly established, *see Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); whether specific facts constitute a violation of established law, *see Osolinski v. Kane*, 92 F.3d 934, 935–36 (9th Cir. 1996); and whether, construing all facts and inferences therefrom in the plaintiffs' favor, defendants are entitled to qualified immunity as a matter of law, *Jeffers v. Gomez*, 267 F.3d 895, 905–06 (9th Cir. 2001).

These were the types of legal questions driving the appeals below, where Petitioners argued that the district court had defined Respondents' asserted constitutional rights at an exceedingly high level of generality, and then failed to identify existing precedent placing the unconstitutionality of Petitioners' specific conduct beyond debate. *See, e.g.*, *Lopez* CA9 Dkt. 17 at 18–19; *Montijo* CA9 Dkt. 15 at 17–18. The Ninth Circuit unquestionably had jurisdiction to rectify those mistakes.

To the extent factual disputes existed, the court of appeals could "determine whether the denial of qualified immunity was appropriate by assuming that the version of the material facts asserted by the non-moving party is correct.'" *Brittain v. Hansen*, 451 F.3d 982, 987 (9th Cir. 2006) (quoting *KRL v. Moore*, 384 F.3d 1105, 1110 (9th Cir. 2004)). The Ninth Circuit avowedly did that here. App. 2, 52. In fact, the panel majority did Respondents one better by improperly ignoring uncontroverted evidence about what Petitioners actually did—including the district court's

findings on that score—and breezily claiming that Bennett and Swaney "did nothing" to help Respondents. App. 3, 4, 53, 54. This Court has jurisdiction to resolve that legal error. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) (reversing the denial of sovereign immunity where the plaintiff's "version of events [was] so utterly discredited by the record that no reasonable jury could have believed him"). And of course the Court has jurisdiction to resolve the other legal questions driving this petition for certiorari and summary reversal. *See, e.g.*, *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (reversing the Ninth Circuit's denial of qualified immunity after that court "defined the clearly established right at a high level of generality"); *Mullenix v. Luna*, 136 S. Ct. 305, 307 (2015) (reversing the denial of qualified immunity after the district court found "genuine issues of fact" and the court of appeals affirmed); *Saucier v. Katz*, 533 U.S. 194, 199 (2001) (same).

II. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER PETITIONERS' CONDUCT AMOUNTS TO DELIBERATE INDIFFERENCE

The Ninth Circuit concluded that Petitioners may have violated the Eighth Amendment because they did not second-guess the medical judgments of nurses who repeatedly evaluated Respondents during their illness. Respondents now collect cases from eight other circuits applying the rule that nonmedical correctional officers generally do not violate prisoners' constitutional rights by relying on the opinions of the medical professionals who are responsible for the prisoners' care. Opp. 21–25. But far from showing that the panel

majority's decisions are "consistent" or "fully in line with" this rule, Opp. 21, Respondents' brief only underscores what national outliers the Ninth Circuit's decisions here are.

No decision puts the split into sharper relief than the Seventh Circuit's decision in *King v. Kramer*, 680 F.3d 1013 (7th Cir. 2012), whose facts Respondents mostly ignore. In *King*, two officers "found [a prisoner] on the floor, screaming and foaming at the mouth" and "called for a nurse." *Id.* at 1016. The nurse "tried to put a pulse oximeter on [the prisoner's] toe, but his shaking was too intense to keep it on." *Id.* at 1016–17. One of the officers "told [the prisoner] to 'quit acting like a child and get up' and accused him of faking the seizure." *Id.* at 1017. When the prisoner was "shaking too hard" for the nurse to get a blood pressure reading, she "used smelling salts to look for a reaction." *Id.* "[T]here was none," which was "consistent with seizures." *Id.* But the nurse "and the officers, convinced [the prisoner] was faking, left [him] lying on the floor," and "did not contact the on-call physician … or emergency medical services." *Id.* An hour later, the prisoner "was again convulsing," and the nurse and officers returned. *Id.* The nurse "again chose not to contact [the on-call doctor] or emergency medical services." *Id.* Instead, "she ordered that the officers move [the prisoner] to a padded cell," which they did. *Id.* The prisoner died later that day. *Id.*

The Seventh Circuit held that the correctional officers had not violated the prisoner's constitutional rights, because they "were not responsible for administering medical care to [him]; rather, they were

'entitled to defer to the judgment of jail health professionals so long as [they] did not ignore [the prisoner],'" which they did not do. *Id.* at 1018 (quoting *Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010)). Moreover, the officers were not "aware that [the nurse] was improperly treating [the prisoner]," since "[t]hey were not trained to assess whether an inmate is genuinely experiencing seizures, and so they lacked the capacity to judge whether [the nurse] made an inappropriate diagnosis." *Id.*

Here, Officers Bennett and Swaney did not ignore Respondents—quite the opposite. Bennett "escorted a nurse to [Respondents'] cell," and she "checked [their] vital signs." App. 6, 55. The next day, "when Bennett came to [their] cell, Bennett went to medical, returned to the cell, and told [Respondents] that he had talked to the medical staff and a nurse said she had seen [them] and there was nothing wrong with [them]." App. 55; *see also* App. 14, 65. Swaney "told medical about [Respondents'] complaint[s]" the same day he saw them, "and medical indicated that no further medical response was needed." App. 6, 55. Regardless whether the nurses who saw Respondents were qualified to render a definitive diagnosis, *see* Opp. 21 n. 3, they were by definition more qualified than Bennett or Swaney to evaluate Respondents' medical condition. Swaney and Bennett thus sought medical care for Respondents and then deferred to the medical personnel who provided it. Neither Bennett nor Swaney had the training or expertise to second-guess those medical judgments. And yet the Ninth Circuit found a possible constitutional violation, and denied them qualified immunity. That result cannot be

reconciled with *King*, where the Seventh Circuit found no constitutional violation on far more striking facts.

The panel majority did not even try to reconcile its decisions with *King*, or with similar decisions from other circuits. *See, e.g.*, *Spruill v. Gillis*, 372 F.3d 218, 237 (3d Cir. 2004) (dismissing an Eighth Amendment claim against a nonmedical correctional officer where the inmate had "sign[ed] up for sick call" and "was seen by an (unidentified) nurse"); *Smith v. Cty. of Lenawee*, 505 F. App'x 526, 534 (6th Cir. 2012) (granting qualified immunity to a nonmedical officer who "documented his concern about [a prisoner] … in an incident report that was placed in [a] nurse's inbox" and had secondhand knowledge of a prison doctor's opinions); *Cuoco v. Moritsugu*, 222 F.3d 99, 111 (2d Cir. 2000) (holding that it was "objectively reasonable" for two correctional officers not to "challenge[] the responsible doctors' diagnosis" of a prisoner); *cf. Gordon ex rel. Gordon v. Frank*, 454 F.3d 858, 864 (8th Cir. 2006) (finding officers deliberately indifferent where they *ignored* a nurse's "medical assessment"); *Dobbey v. Mitchell-Lawshea*, 806 F.3d 938, 941 (7th Cir. 2015) ("If a prisoner is writhing in agony, [a] guard cannot ignore him on the ground of not being a doctor; he has to make an effort to find … *some* medical professional."). Whatever cases the district court may have cited, *see* Opp. 21 (citing App. 22, 26, 33, 73–74, 82), the Ninth Circuit ignored this authority, App. 2–4, 52–54.

The panel majority also ignored what Bennett and Swaney actually did—disregarding Bennett's and Swaney's interactions with medical staff, *compare*

App. 11–12, 14, 21, 64–65, and asserting instead that Bennett and Swaney "did nothing," App. 3–4, 53–54. In so doing, the panel majority erroneously adopted a version of events that is "blatantly contradicted by the record." *Scott*, 577 U.S. at 380. And the Ninth Circuit never *applied* the majority rule that nonmedical officers are entitled to qualified immunity when they rely on the opinions of medical professionals like nurses.

Then Ninth Circuit split with other courts of appeals in another way. The panel majority concluded that Bennett "had reason to think that [each] Plaintiff was receiving no care at all," because—regardless of what Bennett observed firsthand—Monitjo told him "that the nursing staff refused to help or examine him." App. 3, 53.[1] But in the Seventh Circuit, Montijo's say-so would not have been enough. In *Hayes v. Snyder*, 546 F.3d 516, 527 (7th Cir. 2008), for example, the court rejected a prisoner's argument that correctional officers had "actual knowledge, or at least reason to believe, that the prison doctors were 'mistreating (or not treating)' him" simply because "he told [one officer] about his pain and about the doctors' refusal to respond to his pleas for treatment." The Seventh Circuit affirmed summary judgment for the officers because

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[1] Respondents' brief goes even farther, claiming that Bennett "acknowledged that he knew [Respondents] were not being treated." Opp. 23 (citing App. 14). Not so. Bennett testified without contradiction that he "knew that the nurses were monitoring the inmates and … had no reason to believe that Lopez [or Montijo] was not being seen or not being treated by professional medical staff because I personally observed the nurses' cell-front interaction with [them]." *Lopez* Dist. Ct. Dkt. 106-1 at 32, ¶ 35.

they had verified that the inmate was receiving care and then deferred to the "professional judgment of the facility's medical officials," *id.*—like Bennett and Swaney did here, App. 6, 55.

Correctional officers are not required to defer to inmates' opinions about the sufficiency of medical care in the Third Circuit either. Indeed in *Pearson v. Prison Health Service*, 850 F.3d 526 (3d Cir. 2017), the court granted qualified immunity to a nonmedical correctional officer who "knew that [the inmate] was receiving medical care" *on account of* being told that the inmate "was unsatisfied with [medical's] response." *Id.* at 532. The Ninth Circuit's contrary decisions here reflect not "different facts" but diametrically opposed "views of the law." Opp. 23.

Outside the Ninth Circuit, "the law encourages non-medical security and administrative personnel at jails and prisons to defer to the professional medical judgments of the physicians and nurses treating the prisoners in their care without fear of liability for doing so." *Berry*, 604 F.3d at 440. "The policy supporting [this] presumption … is a sound one." *Hayes*, 546 F.3d at 527. It "flows naturally from the division of labor within a prison," which promotes "[i]nmate health and safety … by dividing responsibility for various aspects of inmate life among guards, administrators, physicians, and so on." *Spruill*, 372 F.3d at 236. Requiring nonmedical correctional officers to substitute their (or prisoners') judgments for those of trained medical professionals would "strain this division of labor" and could result in prisoners' *not* getting the care they need. *Id.*; *see also Cuoco*, 222 F.3d at 111

(warning against "the repercussions if non-medical prison officials were to attempt to dictate the specific medical treatment to be given to particular prisoners—for whatever reason"). This Court's review is necessary to bring the Ninth Circuit's approach in line with those of the other courts of appeals.

III. THE NINTH CIRCUIT FAILED TO PARTICULARIZE THE LAW TO THE FACTS

The Court's review is also warranted because this case marks another entry in the Ninth Circuit's long record of denying qualified immunity based on the alleged violation of an abstract right not particularized to the facts of the case.

"This Court has repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quotation marks omitted). But once more the Ninth Circuit has ignored those instructions, concluding that it is clearly established "that a prison official acts with deliberate indifference when the official denies medical care to a prisoner exhibiting serious symptoms of pain or disease." App. 4, 54 (citing *Hunt v. Dental Dep't*, 865 F.2d 198, 201 (9th Cir. 1989)); *see also* App. 3, 53 ("The denial of medical care in the face of an obvious emergency constitutes deliberate indifference." [citing *Hoptowit v. Ray*, 682 F.2d 1237, 1259 (9th Cir. 1982), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995)]).

That sort of "broad general proposition" will not do. *Reichle v. Howards*, 566 U.S. 658, 665 (2012) (quoting

Brosseau v. Haugen, 543 U.S. 194, 198 (2004)).[2] Even the Ninth Circuit previously recognized as much. *Hamby v. Hammond*, 821 F.3d 1085, 1095 (9th Cir. 2016) (rejecting as erroneous a decision holding that "it was clearly established during the relevant time frame that denial, delay of, or interference with medical care of a prisoner constitutes an Eighth Amendment violation if it amounts to deliberate indifference to a serious medical need."). Instead, "[a]s this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Said otherwise, "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). And thus "[t]he relevant inquiry is whether existing precedent placed the conclusion that [the officers] acted unreasonably in these circumstances 'beyond debate.'" *Id.* at 309 (quoting *al-Kidd*, 563 U.S. at 741).

The panel majority did not even purport to decide that existing precedent placed the unconstitutionality

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[2] Contrary to Respondents' claim, Opp. 26, Petitioners challenged the district court's similarly generic statement of the law in their new-trial motion and then again on appeal. *See Lopez* Dist. Ct. Dkt. 129 at 7 ("The Court, here, commits manifest error of law by stating the right as a broad, general proposition instead of particularizing the right at issue based on the context of this case as set forth in recent Ninth Circuit and Supreme Court law."). And none of the Third or Seventh Circuit cases Petitioners cited purports to "state the established right in the same way" for qualified-immunity purposes. Opp. 26.

of Bennett's and Swaney's specific conduct beyond debate under the circumstances. Rather, it concluded that "some evidence *suggests* that Bennett's response to [each] Plaintiff's needs was unreasonable," and that "some evidence *suggests* that Swaney responded to [Respondents'] needs with deliberate indifference." App. 3–4, 52, 54 (emphases added). As this Court recently explained in *Wesby*, however, existing precedent cannot merely "*suggest[]*" that an officer's conduct was unlawful; it must "clearly prohibit the officer's conduct in the particular circumstances before him." *Dist. of Columbia v. Wesby,* 138 S. Ct. 577, 590 (2018) (emphasis added).

The panel majority pointed to no such precedent from this Court that "*squarely governs* the case here." *Mullenix*, 136 S. Ct. at 309 (quoting *Brosseau*, 543 U.S. at 201). None exists. And to the extent there is a "robust consensus of cases of persuasive authority," it favors Petitioners. *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1778 (2015) (quoting *al-Kidd*, 563 U.S. at 742).

The panel majority could not decide that existing precedent placed the unlawfulness of each Petitioner's specific conduct beyond debate for two additional reasons. First, the panel *itself* divided on that question, so it could not say the question wasn't at least debatable.

Second, as explained, the panel majority disregarded the undisputed facts regarding Bennett's and Swaney's "*particular* conduct." *Mullenix*, 136 S. Ct. at 308. Having done so, the panel majority simply could not decide that it was beyond debate that

Bennett or Swaney acted unreasonably under the specific circumstances of the case. *See id.* at 309. The problem, then, is not that "the facts themselves are the subject of the debate," as Respondents contend. Opp. 26. The problem is that the panel majority ignored the undisputed facts, and therefore could not evaluate the lawfulness of Bennett's or Swaney's conduct "in light of the specific context of the case." *Mullenix*, 136 S. Ct. at 308 (quoting *Brosseau*, 543 U.S. at 198).

CONCLUSION

The Court should grant a writ of certiorari and summarily reverse the panel majority's decisions denying qualified immunity.

Respectfully submitted

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